UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: HOLOCAUST VICTIM ASSETS LITIGATION	MASTER DOCKET NO. CV. 06-983 (ERK)
FEE APPLICATION OF BURT NEUBORNE	**NOTICE OF FILING EXHIBITS SUPPORTING U.S. SURVIVORS' JULY 21, 2006 LETTER BRIEF IN OPPOSITION TO NEUBORNE FEE REQUEST**

The following class members in this case, through undersigned counsel, David Schaecter, Leo Rechter, David Mermelstein, Alex Moskovic, Esther Widman, Fred Taucher, Jack Rubin, Henry Schuster, Anita Schuster, Herbert Karliner, Lea Weems, Israel Arbeiter, Sam Gasson, "G.K.," "L.K.," "F.K.," "D.B.," and "J.R.," Nesse Godin, and the Holocaust Survivors Foundation- USA, Inc. (HSF) (henceforth referred to as "Objectors" or "US Survivor class members"), hereby give notice of filing the exhibits cited in their July 21, 2006 Letter Brief to this Court in support of their objections to Burt Neuborne's fee request. In some cases, only the cited excerpts are filed in order to limit the bulk of the filing; the undersigned is prepared to supply complete versions of the excerpted materials at the Court's request. The exhibits are enumerated below:

1. Declaration of Burt Neuborne, November 5, 1999.

2. Supplemental Declaration of Burt Neuborne in Support of An Application for An Order Pursuant to Rule 23(e) Approving the Settlement as Fair, Adequate, and Reasonable, June 26, 2000 (Excerpt).

DUBBIN & KRAVETZ, LLP
701 BRICKELL AVENUE • 16TH FLOOR • MIAMI, FLORIDA 33131-2847 • TELEPHONE (305) 357-9036
Dockets.Justia.com

3. Submission of Lead Settlement Counsel in Support of the Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds, November 20, 2000 (Excerpt).

4. Supplemental Declaration of Burt Neuborne in Response to Objections to the Special Master's Interim Report and Recommendation Filed by Samuel J. Dubbin, Esq., November 14, 2003 (Excerpt).

5. February 20, 2004 Affirmation of Burt Neuborne.

6. Excerpt from *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139 (E.D.N.Y. 2000).

7. Excerpt from *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (E.D.N.Y. Nov. 22, 2000).

8. Excerpt from *In re Holocaust Victim Assets Litig.*, 302 F.Supp. 2d 89 (E.D.N.Y. 2004).

9. Excerpt from *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2d Cir. 2005)

10. Essays, "Whose Money Is It?" by Thane Rosenbaum and Burt Neuborne, *The New York Jewish Week*, June 7, 2004.

11. Letter from Leo Rechter posted on

1. http://prawfsblawg.blogs.com/prawfsblawg/2006/07/nyt_v_burt_neub.html

12. Letter from Alex Moskovic posted on

1. http://prawfsblawg.blogs.com/prawfsblawg/2006/07/nyt_v_burt_neub.html

13. . Letter from Fred Taucher posted on

1. http://prawfsblawg.blogs.com/prawfsblawg/2006/07/nyt_v_burt_neub.html

DUBBIN & KRAVETZ, LLP
701 BRICKELL AVENUE • 16TH FLOOR • MIAMI, FLORIDA 33131-2847 • TELEPHONE (305) 357-9036

This Notice and attachments are being sent to Mr. Neuborne's counsel via email, and the Notice and attachments are being posted on the Court Electronic Docket simultaneously herewith.

Respectfully submitted,

DUBBIN & KRAVETZ, LLP
Attorneys for Objectors
701 Brickell Avenue, Suite 1650
Miami, Florida
(305) 357-9004
(305) 371-4701 (Fax)

By: Samuel J. Dubbin, P.A.
Samuel J. Dubbin, P.A.
Florida Bar No. 328185

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail upon Samuel Issacharoff, Esquire, counsel for Burt Neuborne, 40 Washington Square South, New York City, New York, 10012 (with attachments)this 21st day of July, 2006.

By: Samuel J. Dubbin, P.A.
Samuel J. Dubbin, P.A.

EXHIBIT 1

JA-5208

1/15 96-183

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In re Holocaust Victim Assets Litigation

Master Docket No. CV-96-4849 (ERK)(MDG)

Consolidated with CV-96-5161 and CV-96-461

This Document Relates to All Actions

Declaration of Burt Neuborne, Esq.

1. My name is Burt Neuborne. I am the John Norton Pomeroy Professor of Law at New York University Law School, and Faculty Director of the Brennan Center for Justice at NYU, where I have taught Civil Procedure and Federal Courts for more than 25 years. I am a founding member of the plaintiffs' Executive Committee. I serve, at the Court's suggestion and with the consent of all counsel, as co-counsel for all plaintiffs herein. In that capacity, I participated fully in the preparation and argument of plaintiffs' legal position, and in the extensive negotiations that culminated in the settlement agreement currently before the Court. I also serve, pursuant to the Court's order, as Lead Settlement Counsel in connection with the implementation of the settlement agreement. In that capacity, I have worked closely with counsel for the plaintiffs (especially Morris Ratner, Esq., whose assistance in this area has been invaluable), in formulating and implementing the notice program, and with the Special Master, Judah Gribetz, Esq., in preparing a plan of allocation and distribution. I have communicated personally with hundreds of class members, and have spoken to large gatherings of class-members in Los Angeles, Chicago, New Jersey, and New York. Through closed-circuit television broadcasts to

JA-5209

numerous cities across the United States. I have explained the settlement agreement and notice provisions to numerous interested persons seeking to assist class-members. Finally, with the assistance of Arie Bucheisier of AMCHA, I trained approximately 100 volunteer law students at NYU Law School who have provided personal assistance free of charge to persons requiring help in connection with the settlement. I am particularly grateful for the efforts of many of my students in providing sensitive assistance to elderly, home-bound class-members in the New York area. I am serving without fee.

2. On the basis of my personal experience in connection with the preparation, argument, negotiation, and settlement of this action, I make this declaration in support of the parties' joint application to the Court for an order pursuant to Rule 23(e) FRCP finally approving the proposed settlement agreement as fair and reasonable, and in the best interests of the members of the plaintiff-classes. This declaration is intended to supplement and accompany the Memorandum of Law in Support of Final Approval submitted on behalf of Settlement Class Counsel.

3. The settlement agreement provides for a payment of $1.25 billion[1] by the defendant-banks[2] in four equal installments (two of which will have occurred at the time of the fairness hearing) in return for the release of all Holocaust-related legal claims held by members of the plaintiff-classes against the defendant-Swiss banks, the government of Switzerland, and most

[1]The term "settlement fund" is occasionally used in this declaration to refer to the $1.25 billion payment.

[2]The terms "defendant-banks" or "defendants" as used in this declaration are intended to describe Credit Suisse and Union Bank of Switzerland, and their respective predecessor entities.

explicitly designed to benefit Jews, Gays, Jehovah's Witnesses, the Disabled, and
Romani/Gypsies, groups recognized by the United Nations as having been the targets of systemic
Nazi persecution on the basis of race, religion and personal status. The parties also agreed that
five categories of claimants would benefit from the settlement: (a) holders of Swiss bank
accounts; (b) refugees wrongfully expelled from Switzerland into Nazi-controlled territory; (c)
persons whose property was looted by the Nazis and disposed of by Swiss banks; (d) persons
whose involuntary labor was financed or otherwise assisted by Swiss banks; and (e) all persons
engaged in involuntary labor for Swiss companies. Plaintiffs' counsel declined broaden the class
to permit additional persons to participate in the settlement in order to prevent dilution of claims
to the limited settlement fund by persons whose race, religion, or personal status had made them
systemic victims of Nazi oppression.[11]

24. Accordingly, while reasonable people may differ over the wisdom or propriety of the
settlement, given the circumstances surrounding its negotiation, it is impossible to characterize
the settlement as anything but the result of vigorous, arms-length, adversary bargaining.

D. The Settlement Is Structurally Sound and Procedurally Fair to Absent Plaintiffs

25. Even a fairly bargained compromise of genuinely contestable legal positions that
reaches an excellent result cannot bind absent persons[12] unless the settlement classes are

[11]Among the groups deemed by plaintiffs' Executive Committee to be outside the scope of this litigation were "leftist intellectuals" and members of certain national groups, such as Russians, Ukranians, and Poles, who suffered greatly at the hands of Nazis, but who fell outside the "race, religion, and status" parameters of this litigation. Members of such groups are not precluded from litigating similar claims on their own behalf.

[12]The limits placed by the due process clause on binding absent persons are discussed in Martin v. Wilks, 490 U.S. 755 (1989). See also Phillips Petroleum v. Shutts, 472 U.S. 797 (1985); Matsushita Elec. Indus. Co. v. Epstein, 116 S.Ct. 873 (1985). The seminal case is

structurally sound and procedurally fair.[13] Plaintiffs' Executive Committee and Plaintiffs' Settlement Counsel, in cooperation with defendants' counsel, have designed the settlement agreement to assure maximum fairness to absent class members by utilizing the three traditional methods of assuring institutional fairness: exit, voice, and loyalty.[14] The settlement agreement assures absent class members: (a) the ability to exit by opting out; (b) the ability to participate in the formulation and consideration of the settlement terms; and (c) the avoidance of structural conflicts of interest between and among class members and counsel.

26. The settlement provides for notice to class members of the terms of the settlement, and an opportunity to exit the settlement by opting out and pursuing their claims individually. The extraordinary efforts to notify class members of the terms of the settlement agreement are described in detail in the documents filed by the notice administrators and settlement class counsel. An unprecedented worldwide notice campaign consisting of massive mailings in multiple languages to hundreds of thousands of potential class members, saturation advertising in media calculated to come to the attention of class members, intensive efforts to reach class members through community organizations, and intensive efforts by counsel to address groups of class members and to communicate with individual class members, has resulted in an

---

Hansberry v. Lee, 311 U.S. 32 (1940).

[13]Recent Supreme Court decisions have overturned structurally flawed class action settlement agreements. See Amchem v. Windsor Products, 521 U.S. 591 (1997)(unresolved structural conflict between known present and unknowable future claimants); Ortiz v. Fibreboard, 119 S.Ct. 2295 (1999)(failure to permit opt out despite structural conflicts of interest).

[14]See Albert Hirschman, Exit, Voice and Loyalty (1970). See Geoffrey C. Hazard, Jr., An Historical Analysis of the Binding Effect of Class Suits, 146 U. Pa. L. Rev. 1849 (1998).

extraordinarily positive response by class members.[15] More than 370,000 informational questionnaires have been completed by class members indicating an affirmative desire to participate in the settlement. 291 class members have expressed a desire to exit the settlement by opting out. 130 comments concerning the settlement have been received, most of which criticize counsel for not achieving a higher settlement figure, or for not including additional categories of victims in the settlement.

27. In addition to providing class members with notice and an opportunity to exit the settlement, class members have been given a voice in the plan of allocation and distribution, and an opportunity to intervene as individual plaintiffs with separate counsel at their own expense.[16] Plaintiffs' final negotiating committee included non-legal representatives who are active in the Holocaust survivor community, as well a representatives of organizations active in the community. The plaintiffs' Executive Committee regularly conferred with an informal advisory board open to any organization closely connected with Holocaust survivors. Counsel declined to execute the settlement until a wide spectrum of interested organizations had endorsed the

---

[15]The crucial role of notice and an opportunity to opt out in assuring the structural fairness of modern class action settlements is noted in John C. Coffee, Jr., Class Wars, 95 Colum. L. Rev. 1343 (1995); Samuel Issacharoff, Class Action Conflicts, 30 U.C. Davis L. Rev. 805 (1997). The failure to have provided an opt out possibility doomed the class action settlement before the Court in Fibreboard.

[16]The importance of providing absent class members with a meaningful voice is discussed in Patrick J. Woolley, Rethinking the Adequacy of Adequate Representation, 75 Texas L. Rev. 571 (1997). One objector complained that requiring persons wishing to intervene individually to retain counsel at their own expense unfairly impeded persons from acting individually. It would, however, be absurd to invite individual intervention through individual counsel who could look to the class for payment in the first instance. Of course, if counsel for an intervenor materially benefits the plaintiff class, the potential for common fund fees would exist. But requiring initial legal costs of intervention to be borne individually is the only feasible method of proceeding.

settlement as fair and reasonable. Class members have completed and filed more than 370,000 information questionnaires providing valuable information for use by the Special Master in formulating a plan of allocation and distribution. Interested class members have been encouraged to confer with the Special Master in connection with the development of a plan of allocation and distribution. The proposed plan of allocation and distribution will be provided to all interested class members, who will be given an opportunity to comment on the plan's fairness before it is adopted by the Special Master and presented to the Court for final approval. In every sense of the word, therefore, absent class members have been given a voice through participatory opportunities to shape the settlement.

28. Finally, the structure and mechanics of the settlement agreement assures absent class members the undivided loyalty of dedicated and competent counsel, and a Court-appointed Special Master devoted to achieving the fairest possible result for members of the plaintiff classes, while avoiding unseemly and psychologically destructive formal divisions between and among victims of the Holocaust at the close of their lives.[17] The principal structural impediment to undivided loyalty in certain recent class actions has been the potential conflict between and among entrepreneurial class counsel, who may have a financial interest in fees generated by an expeditious settlement; the defense bar intent on assuring a global settlement; and the interests of absent class members in continued litigation. Similarly, concerns have been expressed that the financial interests of entrepreneurial class counsel may cause counsel to favor certain class

---

[17]The requirement of adequate representation of absent class members is discussed in Owen M. Fiss, The Allure of Individualism, 78 Iowa L. Rev. 965 (1993); Marcel Kahan & Linda Silberman, The Inadequate Search for "Adequacy" in Class Actions, 73 NYU L. Rev. 765 (1998); Edward H. Cooper, The (Cloudy) Future of Class Actions, 40 Ariz. L. Rev. 923 (1998).

members at the expense of others in setting the terms of any settlement.[18] Such a "divided loyalty" structural concern is completely absent from this case. Key members of the plaintiffs' Executive Committee who negotiated this settlement agreement are providing their services on a pro bono basis, at most requesting that in lieu of attorneys fees payments be made to law schools to endow Holocaust Remembrance Chairs in honor of class members who failed to survive, and to foster international human rights law designed to prevent future human tragedies. Numerous lawyers, including Lead Settlement Counsel, have waived all attorneys fees. Those relatively few members of the plaintiffs' Executive Committee who are seeking fees personally have agreed to limit their fee applications to the traditional "civil rights" standard of lodestar for time actually expended that materially advances the litigation, and all fees are capped at no more than 1.8% of the settlement fund, with discretion to award a lower sum. No possibility exists, therefore, of a significant financial conflict of interest between counsel and any class member.

29. In any class action, it is necessary for counsel to make judgments that impact with differential effect on categories of class members.[19] As this case evolved, it became clear that

---

[18] Both Amchem and Fibreboard note the potential for financial conflicts of interest between entrepreneurial counsel, the defense bar, and absent class members. The relationship between entrepreneurial counsel, the defense bar, and absent class members in the modern class action has been the subject of substantial academic commentary. Jonathan Macey and Geoffrey P. Miller, The Plaintiffs' Attorneys Role in Class Action and Derivative Litigation : Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1 (1991); Samuel Issacharoff, Governance and Legitimacy in the Law of Class Actions, 1999 Sup. Ct. Rev. (forthcoming); John Coffee, Jr., The Corruption of the Class Action: The New Technology of Collusion, 80 Cornell L. Rev. 851 (1995); David L. Shapiro, Class Actions: The Class as Party and Client, 73 Notre Dame L. Rev. 913 (1998); Charles Silver and Lynn Baker, I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds, 84 Va. L. Rev. 1465 (1998).

[19] See Nancy Morawetz, Bargaining, Class Representation, and Fairness, 54 Ohio St. L. Rev. 1 (1993)

difficult judgments involving the "horizontal" allocation of the settlement fund between and among categories of claimants, and the "vertical" allocation of the settlement fund between generations would be necessary. The settlement agreement provides for a structurally fair, socially responsible method of making those difficult allocational judgments.

30. Plaintiffs' Executive Committee, together with counsel for the defendants, initially sought to clarify the allocational judgments by designating five sub-classes representing: (a) holders of Swiss bank accounts; (b) victims of Nazi looting whose property was disposed of through Swiss entities; (c) refugees who were unlawfully expelled by Switzerland into Nazi territory; (d) slave laborers who worked in facilities aided by Swiss financial entities; and (e) slave laborers who worked for Swiss companies. Rather than undertake to make allocational judgments between and among categories of claimants, plaintiffs' Executive Committee determined that it would be most appropriate to request a knowledgeable, respected Court-appointed Special Master to formulate a fair plan of allocation and distribution, subject to full comment and consideration by the members of the plaintiff-classes, and final approval by the Court after a full hearing. The Court appointed Judah Gribetz, Esq., as Special Master, and charged him with responsibility for developing a proposed plan of allocation and distribution. If the Court accepts the settlement as fair and reasonable under Rule 23(e), Mr. Gribetz will circulate a proposed plan of allocation and distribution to interested members of the class, will receive comments on the plan, and will present a final plan to the Court for approval.

31. In connection with developing a plan of allocation and distribution, Mr. Gribetz will have full access to the informational questionnaires submitted by the members of the plaintiff classes, will consult (and has consulted) broadly with individuals and organizations interested in

JA-5227

the allocation process, with members of plaintiffs' Executive Committee, and with other interested persons in an effort to formulate a plan that is morally and legally acceptable to the plaintiff community. All suggestions, objections and comments will be carefully and respectfully considered, and the proposed plan will be subject to comments and criticism by the members of the plaintiff classes, and to final approval by the Court.

32. Plaintiffs' Executive Committee and Settlement Counsel considered, and rejected, the appointment of separate counsel for each sub-class and generation. The members of plaintiffs' Executive Committee felt unable and unwilling to Balkanize their loyalties to the victims of the Holocaust by formally entering into an adversary relationship with counsel for other victims. The appointment of new counsel from outside the plaintiffs' Executive Committee was rejected, first, because it would have taken a substantial period of time for new counsel to acquire the expertise to carry out their tasks in a responsible manner; and, second, because the very substantial expense of five or more sets of new counsel would have been payable from the survivors' funds.

33. Even more important than the practical impediments to using separate counsel to represent each subclass and generation, were the adverse social and psychological consequences of such a formal division of Holocaust victims into rival interest groups squabbling over a settlement fund that all agree is inadequate to provide full compensation to the victims. The members of the plaintiff classes are elderly victims of an unparalleled human catastrophe. At the close of their lives, it would be socially and psychologically irresponsible to pit one group of Holocaust victims against another in an unseemly battle for a larger share of a limited settlement fund that cannot do real justice to all. Instead, freed from any structural conflict of interest caused by financial self-interest, each plaintiffs' counsel pledged to assist the Special Master by

making available all relevant factual material, and by providing any necessary legal assistance in an effort to be fair to all class members. If the Court approves the settlement agreement, the process of allocation will then go forward in a scrupulously fair, but non-adversarial manner that respects the rights and dignity of class members.

34. While such an effort to temper the formal adversary process by imposing overlapping, non-adversary responsibilities on counsel may not be appropriate in other settings, under the unique circumstances of this litigation, the fourfold safeguards of: (a) dedicated pro bono lawyers pledged to assist in the development of the fairest plan of allocation; (b) a Special Master appointed to assure the development of the fairest possible plan; (c) careful procedures encouraging participation by class members in shaping the final plan of allocation and distribution; and (d) a knowledgeable District Judge who participated fully in the negotiations, and who will ultimately pass on the fairness of any allocation plan, satisfies Rule 23, the commands of due process, and the ethical demands of this unique effort to invoke the class action mechanism on behalf of elderly Holocaust victims who lack the resources to assert legal claims of their own.

35. Several formal objections to the settlement have been filed, none of which pose serious obstacles to its acceptance under Rule 23(e).[20] The formal objection are dealt with at length in the accompanying Memorandum of Law. Briefly, one objection is from members of a national group that suffered at the hands of Nazis, but were not defined as members of the plaintiff class. Since the settlement does not preclude the objectors from litigating their claims

[20]Counsel will respond separately to each objection in more detail in connection with formal hearings scheduled by the Court on November 22, 1999.

on their own behalf, their objection to the settlement is untenable. Indeed, it would have been a breach of faith for plaintiffs' counsel to have opened the class to a broader category of participants without also obtaining a higher settlement figure. When defendants declined to increase the settlement figure, plaintiffs declined to broaden the class beyond the named systemic victims of Nazi persecution based on race, religion or personal status.

36. A second objection purports to be on behalf of disabled class members, claiming inadequate notice and representation. Given the massive notice program, the insistence by plaintiffs' Executive Committee that the disabled be permitted to participate in the settlement, and the active participation of disability rights groups in the shaping of the plan of allocation and distribution, the objection is highly unpersuasive.

37. A third objection is from the Insurance Commissioner of the State of Washington, complaining that several Swiss insurance companies will receive releases under the settlement. The Commissioner argues that releasing the Swiss companies will complicate efforts by insurance commissioners to resolve the issue of unpaid Holocaust-era policies. Swiss insurance companies against which Holocaust-era litigation is currently pending are excluded from any releases. To the extent the Commissioner's objection is premised on an alleged inadequacy in the notice program, it is clearly without merit. The unprecedented intensity of the notice program belies any effort to challenge its adequacy. More importantly, to the extent the Commissioner argues that releases in this action interfere with the ongoing efforts by insurance commissioners to achieve a fair non-judicial resolution of unpaid Holocaust-era insurance policies, the objection is a non-sequitur. Nothing prevents the insurance commissioners from using their regulatory authority to require payment of appropriate Holocaust-era policies, whether or not companies can

JA-5230

be sued on those policies in an American court. Accordingly, the grant of a release of legal claims to three Swiss insurance companies that have not been sued in the United States as a condition of a $1.25 billion settlement of the claims of thousands of Holocaust victims hardly poses a serious obstacle to the efforts of insurance commissioners to resolve the problem of Holocaust-era insurance claims in a non-judicial manner.[21]

38. A fourth objection is on behalf of potential owners of valuable artwork looted by Nazis and which may currently, or in the future, be owned by a released Swiss entity. The objectors argue that it is impossible for an owner of such artwork to know whether valuable legal claims exist. Several persons who are pursuing known claims for the return of specific works of art have opted out. Representatives of persons with as yet unknown claims have purported to opt out on their behalf. It is unclear whether potential future claims for the return of specific works of art by unknown persons who have no way of knowing whether such claims exist can be precluded without raising serious due process problems. It is, however, premature to speculate on such an issue at this time. Rule 23(e) does not require a District Judge to anticipate every possible application of a class action settlement in every possible hypothetical setting, and to issue an advisory opinion concerning its validity in all such hypothetical settings. Rather, as with facial review of a statute, a Rule 23(e) judge must pass upon the facial validity of the settlement and its fairness in the vast bulk of its applications, leaving for another day its applicability to exotic fact-patterns that may never materialize. If, in the future, an unknown person discovers artwork looted by the Nazis in the possession of a released Swiss entity, and if the Swiss entity

[21] I note that no objection has been filed by Laurence Eagleburger, the chair of the commissioners' efforts, or by any commissioner significantly involved in the process.

JA-5231

rejects its moral duty to return the artwork, and if the claimant poses a credible legal claim for its return, there will be time enough to decide whether this settlement precludes the assertion of such a valid legal claim.

39. Since the settlement before the Court is both fair and reasonable, and since the procedures surrounding its negotiation and implementation carefully respect the interests of all class members, I ask that the Court approve the settlement as fair and reasonable pursuant to Rule 23(e), and to instruct the Special Master to develop and circulate a proposed plan of allocation and distribution, subject to the final approval of the Court.

Dated: New York, New York
November 5, 1999

Burt Neuborne
40 Washington Square South
New York, New York 10012
(212) 998-6172

Lead Settlement Counsel

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In re: HOLOCAUST VICTIM ASSETS LITIGATION — Master Docket No. CV-96-4849 (ERK) (MDG)

JACOB FRIEDMAN, et. al., Plaintiffs

against — Civ. Act. No. CV 96 5161

UNION BANK OF SWITZERLAND, et. al. Defendants

GIZELLA WEISSHAUS, et. al. Plaintiffs

against — Civ. Act. No. CV 96-4849

UNION BANK OF SWITZERLAND, et. al. Defendants

WORLD COUNCIL OF ORTHODOX JEWISH COMMUNITIES, INC. et. al. Plaintiffs

against — Civ. Act. No. 97-0461

UNION BANK OF SWITZERLAND, et. al. Defendants

SUPPLEMENTAL DECLARATION OF BURT NEUBORNE IN SUPPORT OF AN APPLICATION FOR AN ORDER PURSUANT TO RULE 23(e) APPROVING THE SETTLEMENT AGREEMENT AS FAIR, ADEQUATE AND REASONABLE

JA-5632

Burt Neuborne, an attorney duly admitted to practice in this Court and the Courts of New York State, hereby declares under penalty of perjury:

1. With the consent of the parties, I serve as co-counsel for all plaintiffs, and am serving at the request of the Court as plaintiffs' lead settlement counsel. I make this supplemental declaration in support of plaintiffs' application for an order pursuant to Rule 23(e) FRCP approving the amended settlement agreement as fair, adequate and reasonable.

2. On January 26, 1999, the parties entered into a settlement agreement, amended on November 16, 1999, pursuant to which the defendant-banks - UBS AG (hereafter UBS) and Credit Suisse - agreed to pay $1.25 billion to certain persons who allegedly suffered harm at the hands of the defendants, or at the hands of one or more non-party releasees, as the result of certain alleged Holocaust-related activities of Swiss entities. (A copy of the original settlement agreement, as amended on November 16, 1999, is annexed hereto as Exhibit 1). The settlement agreement is designed to benefit a discrete category of persons who were targets or victims of systematic Nazi persecution on grounds of race, religion or personal status, defined by the settlement agreement as Jews, Jehovah's Witnesses, Romani, the disabled, and homosexuals. The general category of defined targets or victims of Nazi persecution on the basis of race, religion, and personal status is divided in the settlement agreement into five separate classes to correspond with the principal methods by which the alleged Holocaust-related activities of Swiss entities are said to have injured plaintiffs.

3. One class, the "Deposited Assets" class, consists of targets or victims of Nazi persecution on the basis of race, religion, or personal status, defined by the settlement agreement as Jews, Jehovah's Witnesses, Romani, the disabled, and homosexuals, who seek the return of

funds or other assets that were allegedly deposited with Swiss banks prior to the Holocaust, and that have not been returned to their rightful owners. A second class, the "Looted Assets" class, consists of the above-defined victims of Nazi persecution who claim that defendants or any other non-party releasee assisted in disposing of property looted from them by the Nazis. A third class, the "Slave Labor I" class, consists of the above-defined victims of Nazi persecution who were forced to perform slave labor for German corporations, and who claim that Swiss banks acted as the repository for profits earned through slave labor. A fourth class, the "Slave Labor II" class, consists of all persons who claim to have performed slave labor directly for a Swiss corporation. A fifth class, the "Refugee" class, consists of the above-defined victims of Nazi persecution who claim that they were either denied entry into, expelled from, or mistreated while interned in, Switzerland during the relevant period. In return for the $1.25 billion payment, the members of the five plaintiff classes have agreed to release the defendant banks and an array of non-party Swiss releasees from continued liability for WW II-related activities relevant to the five defined classes.

4. I have submitted two declarations, dated November 5, 1999, and November 15, 1999, respectively, copies of which are annexed hereto as Exhibits 2 and 3, in support of an application for an order pursuant to Rule 23(e) determining the settlement agreement to be fair and adequate. I note that the emphasis in my earlier declarations on the presence of "exit, loyalty, and voice" as crucial factors in assessing the fairness of a class action settlement under Rule 23(e) has been favorably discussed in John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 Colum. L. Rev. 370 (2000), and Samuel Issacharoff, Governance and Legitimacy in the Law of Class Actions, 1999 Sup. Ct. Rev. ____

(forthcoming). In light of: (a) the vigorous representations by the defendant-banks concerning their willingness to cooperate in the good faith implementation of the deposited assets claims process that is contemplated by the settlement agreement, which representations are more fully described, infra, at paragraphs 22 - 30; (b) certain proposed amendments to the settlement agreement that have been agreed to by the parties, annexed hereto as Exhibit 4; and (c) the substantial progress in negotiating an amended agreement on an insurance claims process described more fully, infra, at paragraphs 31 - 37, I renew my application for an order approving the settlement agreement as fair and reasonable within the meaning of Rule 23(e).

5. I submit this declaration in response to certain objections to the original settlement agreement posed at the fairness hearings held in New York and Jerusalem, on November 29, and December 14, 1999, respectively, and to comment on concerns over the ability to obtain access to information needed to administer a claims process fairly, efficiently, and in accordance with due process of law.

I. Concerns That the Settlement's Adequacy Should Be Re-Evaluated in Light of the Findings of the Volcker Report

6. Several persons voiced concern at the fairness hearing in Jerusalem that the adequacy of the $1.25 billion settlement should be re-evaluated in light of the findings of the Report of the International Committee of Eminent Persons (ICEP), chaired by Paul Volcker, dated December 6, 1999, that identified 54,000 accounts in Swiss banks that have a probable or possible connection to Holocaust victims. (A copy of the ICEP report, often referred to as the Volcker Report, is annexed hereto as Exhibit 5).

7. As I note at paragraphs 18-29, I believe that the Volcker Report is an enormously

important historical document that validates many of the allegations in plaintiffs' complaints, and makes possible a meaningful claims process for the deposited assets class. It does not, however, cast doubt on the fairness and adequacy of the $1.25 billion settlement figure.

8. Prior to the issuance of the Volcker Report, plaintiffs' counsel were confident that, if the case had proceeded to trial, and if they were granted adequate discovery, plaintiffs would be in a position to demonstrate the existence of large numbers of bank accounts in Swiss banks with a probable or possible connection to Holocaust victims. In fact, in conducting the negotiations that culminated in the $1.25 billion settlement agreement, plaintiffs' negotiating team utilized figures derived from an economic analysis of the flow of funds into Switzerland during the relevant period. While the flow of funds figures were considerably higher than $1.25 billion, when discounted for the risks of litigation, the need for expeditious action, and the necessarily imprecise nature of the economic analysis itself, the figures utilized by counsel in conducting the actual negotiations were roughly comparable to figures derived from the Volcker Report.

9. Thus, although the Volcker Report validated many of the allegations in plaintiffs' complaints, it did not eliminate the need to settle the deposited assets claims for a reasonable sum. Extensive litigation, even after the Volcker Report, would have resulted in delays of several years, and would not necessarily have been successful. Defendants vigorously opposed plaintiffs' efforts to obtain discovery, arguing that Swiss law forbade the discovery needed to present the case effectively at trial. Defendants also posed challenges to continued litigation in an American forum, posing a risk that the litigation would have been transferred to Switzerland, where it could not have proceeded on a classwide basis, and would have been subject to dismissal on technical grounds. Finally, defendants vigorously asserted that many of the

accounts identified in the Volcker Report would not, under closer scrutiny, be found to have belonged to victims of the Holocaust. Accordingly, given the age of the plaintiff class, and the uncertainty inherent in any complex litigation, plaintiffs believed that a speedy settlement for a reasonable sum was far preferable to continued litigation.

10. Finally, while it is impossible to predict with certainty the results of the deposited assets claims process, I believe that the portion of the settlement fund that will be allocated to deposited assets by the Special Master will be adequate to pay all claims for deposited assets identified in the Volcker Report that are eventually certified for payment by the claims resolution process established hereunder. Thus, in my opinion, no basis exists to question the fairness and reasonableness of the settlement agreement as a result of the Volcker Report. If anything, the Volcker Report confirms the appropriateness of the deposited assets aspect of the settlement agreement, and validates the settlement amount as fair and reasonable.

II. Concerns Over Holding the Fairness Hearings Prior to the Availability of More Specific Information on Individual Recoveries

11. At the fairness hearings, several persons criticized the decision to hold the fairness hearing prior to receiving notice of the specific amounts they were likely to recover. I agree that, ordinarily, it is preferable to provide specific information to individual class members concerning their likely recovery prior to the fairness hearing in order to permit criticism and challenge, if appropriate. However, the special circumstances of this litigation, involving five worldwide settlement classes arising out of horrific events that transpired 60 years ago, make it virtually impossible to provide specific information to individuals about their precise recovery prior to the completion of the elaborate claims processes contemplated by the settlement agreement, and

under consideration by the Special Master. The implementation of such an elaborate and expensive set of claims processes would be impossible in the absence of a threshold finding by the Court that the basic settlement agreement, including the gross settlement amount and the procedures for allocating and distributing specific amounts to class members, is fair and reasonable. Thus, even if we wished to do so, it is physically impossible to provide class members with specific information concerning their individual recoveries at this stage of the proceedings.

12. Instead, we provided elaborate notice of the scrupulously fair procedures that were to be used to reach the point where specific amounts would be payable, and asked the class to pre-commit to those procedures in lieu of considering a specific amount at this stage of the proceedings. The class overwhelmingly endorsed such an approach. Approximately 600,000 questionnaires were returned by putative class members, including only 400 decisions to opt out of the described procedures. Given the overwhelming acceptance by the class of the bifurcated process, and for the reasons set forth in my declaration dated November 15, 1999, I ask the Court to recognize that such a bifurcated process is particularly appropriate in the context of this case, especially since it is simply impossible to be more specific at this time. Accordingly, I believe that the unique circumstances of this complex litigation require both a fairness hearing on the terms of the basic settlement, and a subsequent opportunity to comment on the Special Master's recommended plan of allocation and distribution. Thus, the parties contemplate that once the Court has approved the basic fairness of the settlement and its attendant procedures, the Special Master will promptly issue his recommendations concerning allocation and distribution, those recommendations will be transmitted for comment and criticism to the members of the plaintiff-

classes, and will be the subject of a hearing before the Court. Only after the Court approves the plan of allocation and distribution will a claims process capable of generating specific figures be possible.

III. Objections to the Settlement as Insufficiently Probative of Swiss Complicity

13. Several thoughtful objectors, exemplified by the communication of Charles Sonabend, annexed hereto as Exhibit 6, have questioned, not the financial terms of the settlement, but the propriety of settling Holocaust-related claims against Swiss entities in a manner that, in the view of the objectors, fails to demonstrate the deeply immoral nature of Swiss complicity in Nazi war crimes.

14. Mr. Sonabend courageously pursued an individual action in Swiss courts seeking relief for Swiss government action in denying entry and expelling Jewish refugees during WWII. Although the Swiss courts denied legal culpability, the courts acknowledged the moral weight of Mr. Sonabend's allegations, and awarded a substantial payment to Mr. Sonabend and his sister, Ms. Sabine Sonabend. Their courage in pursuing the litigation forced Swiss authorities to acknowledge the moral bankruptcy of Switzerland's WWII immigration policy. In Mr. Sonabend's view, only a flood of similar individual actions, or the extensive trial of plaintiffs' class action allegations, can provide adequate public ventilation of the nature of Swiss complicity in Nazi war crimes.

15. I deeply respect Mr. Sonabend's position, and his courage in seeking justice. If I believed that we were "sweeping under the carpet" the historical question of Swiss complicity in WWII, I would join Mr. Sonabend in opposing this settlement. I must disagree, however, with his objection to the settlement as insufficiently probative of Swiss complicity. First, the very size

conditional objection premised on a challenge to notice, I will reluctantly request the Court to decertify the disabled component of this litigation as incapable of being adequately notified of their potential claim.

44. Accordingly, I respectfully request that the Court enter an order approving the settlement agreement as a substantively fair resolution of the issues raised by this litigation within the meaning of Rule 23(e). In view of: (a) the vigorous representations of the defendant-banks concerning their willingness to cooperate in the fair and expeditious administration of a deposited assets claims process described, supra, at paragraphs 22-30; (b) the Court's power under Rule 23(d)(1)(2) and (5), and its equitable supervisory power, to issue appropriate orders needed to assure the fair and expeditious administration of claims processes in connection with all five settlement classes; (c) the text of proposed amendments submitted herewith providing for the administration of a fair and efficient claims process in connection with the deposited assets class; and (d) the substantial progress made by the parties in reaching agreement on an acceptable insurance claims process, I do not believe that additional orders are necessary at this time.

Dated: June 26, 2000
New York, New York

/ Burt Neuborne

Burt Neuborne

EXHIBIT 3

263-C 11/20/00

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In re: HOLOCAUST VICTIM ASSETS LITIGATION	Master Docket No. CV-96-4849 (ERK) (MDG)
JACOB FRIEDMAN, et. al., Plaintiffs against UNION BANK OF SWITZERLAND, et. al. Defendants	Civ. Act. No. CV 96 5161
GIZELLA WEISSHAUS, et. al. Plaintiffs against UNION BANK OF SWITZERLAND, et. al. Defendants	Civ. Act. No. CV 96-4849
WORLD COUNCIL OF ORTHODOX JEWISH COMMUNITIES, INC. et. al. Plaintiffs against UNION BANK OF SWITZERLAND, et. al. Defendants	Civ. Act. No. 97-0461

SUBMISSION OF LEAD SETTLEMENT COUNSEL IN SUPPORT OF THE SPECIAL MASTER'S PROPOSED PLAN OF ALLOCATION AND DISTRIBUTION OF SETTLEMENT PROCEEDS

In my capacity as court-appointed Lead Settlement Counsel, I make this submission: (a) in support of the Special Master's Proposed Plan of Allocation and Distribution of the Settlement Proceeds; (b) in response to the defendants' submission commenting on the Special Master's Plan; and (c) in response to certain objections to the Special Master's Plan lodged by interested parties.

1. Pursuant to a procedure that was overwhelmingly approved by the members of the settlement classes and by the Court, Judah Gribetz, Esq., as court-appointed Special Master, was given responsibility for proposing a plan for the allocation and distribution of the $1.25 billion settlement proceeds herein among the five settlement classes. Performance of that difficult task required the Special Master to (a) conduct a painstaking inquiry into the factual and legal underpinnings of each settlement class in order to permit the Special Master to propose an equitable inter-class allocation of the settlement proceeds based on a reasoned assessment of the relative strength of the legal and factual claims asserted by each of the five plaintiff classes; and (b) marshall the available data needed to develop fair intra-class plans for the orderly distribution of the allocated funds within each of the five settlement classes. The Court's March 31, 1999 order appointing the Special Master states at page 3 that "[t]he Special Master shall make findings of fact and conclusions of law with respect to the factors that are to be considered in determining eligibility and valuing a claim under the Plan of Allocation and Distribution." Thus, the suggestion in defendants' submission, dated October 17, 2000, that much of the factual discussion in the Special Master's report is "unnecessary" seems clearly wrong. Without a painstaking review of the underlying law and facts, the Special Master would

have no basis on which to premise a legally acceptable plan of allocation, nor would the Court have a basis on which to evaluate the Special Master's recommendations.

2. The Special Master's "findings of fact" are the result of intense research by a court-appointed Special Master who, over a period of more than one year, engaged in an extraordinary effort to develop a factual basis for a legally and morally just allocation formula. The evidentiary weight of such findings in other proceedings is not an issue for consideration at this time. But it cannot be doubted that the findings are necessary, indeed crucial to the work of the Special Master in this case.

3. The decision to utilize a Special Master to propose a plan of allocation and distribution was motivated by a desire to spare Holocaust survivors from being forced into an adversarial relationship that would have required them to squabble over a settlement fund that, while substantial, is necessarily insufficient to do full justice to all members of each plaintiff class. It was hoped that a neutral Special Master, acting with the guidance of the affected community, could conduct a serious inquiry into the facts and law, and propose a plan of allocation and distribution that would do non-adversarial justice to the claims of all class members.[1] In carrying out his assigned task, the Special Master utilized the relative strength of the legal and factual claims asserted against Swiss entities by the five plaintiff classes as the principal allocation criterion. Reliance on any other allocation criteria would have been inappropriate, since the settlement fund is not an unrestricted charity to be used to compensate victims of Nazi oppression in accordance with principles of abstract justice, but a settlement fund

---

[1]After receiving a careful description of the process, the class overwhelmingly ratified the use of a Special Master as an alternative to adversary proceedings involving the five classes.

arising out of a lawsuit designed to compensate only those victims of Nazi oppression whose injuries were either caused by, or exacerbated by, the alleged behavior of Swiss entities.

4. The Special Master was remarkably successful in inviting and obtaining the guidance of interested members of the community. He conferred widely with an extraordinary array of persons who expressed a desire to provide advice or guidance on the fairest way to allocate the settlement proceeds. The openness and transparency of his deliberations adds immeasurably to the moral and legal persuasiveness of his proposed plan of allocation.

5. Unfortunately, it proved more difficult for the Special Master to obtain the facts needed to inform his deliberations. Neither the defendants, the relevant agencies of the Swiss government, nor private Swiss entities initially cooperated with the Special Master's requests for information needed to fulfill his mandate. It was repeatedly necessary for counsel and the Court to negotiate and cajole in order to obtain access to basic information needed to carry out the Special Master's mandate. Despite the obstacles placed in his path, however, the Special Master was ultimately successful, often with the assistance of the Court and counsel, in assembling the information needed to make a reasoned judgment concerning inter-class allocation, and intra-class distribution. While reasonable people may differ over the precise contours of the Special Master's plan, and while additional allocation decisions may be necessary in the future, I recommend adoption of the Special Master's Proposed Plan in its entirety as a careful, judicious, and completely fair blueprint for the allocation and distribution of the settlement proceeds.

Counsel agrees that it is appropriate to recognize the suffering of disabled victims of Nazi persecution with a cy pres payment of $12.5 million designed to advance the rights of the disabled. Such a payment is, however, inconsistent with the Special Master's explicit desire to make a maximum initial attempt to distribute the entire settlement fund to individuals rather than groups. Consistent with the Special Master's approach, the cy pres payment in connection with the Looted Assets Class is merely an indirect distribution of food and medicine to distinct individuals. Accordingly, it is premature to consider a cy pres distribution to any group at this time. If and when funds become available for re-allocation, I will urge that a cy pres payment of $12.5 be authorized to recognize the suffering of disabled victims of National Socialism.

46. Remaining objections to the Special Master's Proposed Plan are lodged by persons who object to the failure of the Special Master to have allocated funds to organizations or to individual victims of looting. The submissions are, in general, both thoughtful and heartfelt. By and large, though, they ignore the fact that the allocation plan must be keyed to the relative strength of the factual and legal claims of class members against Swiss entities. It is impossible to use the settlement fund as a general fund to redress injuries caused by Nazis, both because the fund is too small to fulfil that purpose, and because the fund is the result of a lawsuit against Swiss entities, not Nazi oppressors.

Objections Lodged by Class members Zuber, Smith and Lobet

47. Purporting to represent three members of the class, Lawrence Schonbrun, an attorney who appears widely as an objector in class action litigation, has lodged several trivial objections to the Special Master's Plan. His first objection complains that the voluminous two volume document was not mailed to the members of the class. He acknowledges that a 38 page

summary was widely distributed to interested persons, but appears to suggest that an enormously expensive additional distribution of the two volume document was required. In fact, widespread notice of the plan was provided.

48. The next objection is to the allocation of $800 million for the Deposited Assets Class. The objector claims to be unable to understand the derivation of the $800 million figure. As the Special Master has explained, however, the figure is a conservative estimate of the funds needed to pay the Deposited Assets Class in full. If the lack of records makes it impossible to distribute the full $800 million, the Special Master recommends a re-allocation pursuant to open and transparent procedures. Thus, the objectors' concern over re-allocation appears both misplaced and premature. Similarly, the objector's purported concern with administrative overhead is unjustified. At the appropriate time, a full accounting of all administrative costs will be forthcoming. A hearing on the Special Master's Plan of Allocation and Distribution is simply not the point at which the technical details of minor administrative costs are to be considered. In any event, the parties are committed to an extremely lean administration of the fund. The CRT will function under the supervision of Paul Volcker. The Slave Labor administrative costs are virtually non-existent, since we are using the German Foundation as our administrative arm. The Looted Assets administrative costs are negligible because of the cy pres nature of the distribution. It is amusing that the objector, who appears to be more interested in harassing the participants than in constructively participating in the proceedings, simultaneously complains that administrative costs are too high, while arguing that nominal Looted Assets distributions should be made to millions of class members at astronomical administrative cost. The objector ignores the fact that merely demonstrating looting by the Nazis does not justify a payment from

the settlement fund without proof of participation by a Swiss Releasee. He also ignores the fact that class members with documented claims of looting have been afforded a remedy by the German Foundation. Finally, the objector complains that insufficient information is given concerning the distribution of $100 million to needy victims. In fact, the "Hesed" distribution program recommended by the Special Master is both well known and extremely highly regarded. If the objector desires additional information concerning the Hesed programs, I am prepared to provide him the address of the relevant institutions. The objector's concern over a timetable for payment is also trivial. The CRT is prepared to move immediately to resolve claims to deposited assets. Slave labor payments are ready for distribution as soon as the identities are made known by the German Foundation. Looted assets cy pres distribution will be made as soon as the settlement permits a distribution. As the objector should know, no payments may be made from the fund until the completion of all appeals. Such a provision is standard.

49. Finally, the objector's demand that all classes receive separate representation has already been determined by the Court in connection with its decision approving the settlement's fairness, including the procedure for allocating and distributing the proceeds. In designing this settlement agreement, the parties were acutely aware that the worst possible course would be to pit categories of Holocaust survivors against one another at the end of their lives in an unseemly squabble over a settlement fund that, necessarily, is too small to do complete justice to all victims. Accordingly, class members were asked to endorse a scrupulously fair procedure for determining allocation and distribution that included the three principal attributes of procedural fairness - exit; loyalty; and voice. Any dissenting class member was offered the opportunity to opt out. The allocation decision was vested in a wholly neutral

Special Master, Judah Gribetz, Esq., with unquestioned loyalty to all Holocaust survivors. And the process of decision was designed to assure that all interested persons had complete access to the Special Master. The class opted overwhelmingly for the non-adversarial option. Nothing in Amchem or Ortiz converts a class action involving a unique effort to provide Holocaust survivors with a modicum of justice at the end of their lives into a prison within which survivors must fight with each other over a fund that cannot do complete justice to all.

50. Accordingly, I request the Court to issue an order approving the Special Master's Proposed Plan of Distribution and Allocation.

Dated: November 20, 2000
New York, New York

Respectfully submitted,

Professor Burt Neuborne
BRENNAN CENTER FOR JUSTICE
161 Sixth Avenue, 12th Floor
New York, New York 10013
Fax: (212) 995-4550

Lead Settlement Counsel

EXHIBIT 4

JA-7102

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In re Holocaust Victim Assets Litigation	Master Docket No. CV-96-4849 (ERK)(MDG) Consolidated with CV-965161 and CV-96-461
This Document Relates to All Actions	

Supplemental Declaration of Burt Neuborne in Response to Objections to the Special Master's Interim Report and Recommendation Filed by Samuel Dubbin, Esq.

1. I have served the plaintiff classes since February 1, 1999, as court-appointed Lead Settlement Counsel. In that capacity, I filed a declaration, dated October 13, 2003, in support of the recommendations contained in the Interim Report of the Special Master, dated October 2, 2003. I submit this supplemental declaration in response to objections to the Special Master's proposed recommendations lodged by Samuel Dubbin, Esq., on October 31, 2003, on behalf of an organization identified as Holocaust Survivors Federation - USA (HSF-USA).[1]

[1] I note that the objection filed on behalf of HSF-USA is procedurally deficient since it is lodged solely on behalf of a membership organization, without any information concerning the organization's actual membership. Since the standing of a membership organization to object to the Special Master's recommendation is wholly dependent upon the individual standing of its members, the Second Circuit has declined to permit a similarly opaque organizational objector, the Polish-American Defense Committee, to challenge the definition of the plaintiff classes herein. *In re Holocaust Victim Assets Litigation*, 225 F.3d 191, 196 (2nd Cir. 2000). See also *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977). On the current record, there is insufficient information to determine whether HSF-USA members exist who would have standing to challenge the proposed *cy pres* administration of the Looted Assets class. In order to have standing, a putative objector must demonstrate an injury-in-fact flowing from the challenged action, and not merely a generalized disagreement over the moral or legal basis for the action. *Warth v. Seldin*, 422 U.S. 490 (1975); *Allen v. Wright*, 468 U.S. 737 (1984).

aff'd 119 F.3d 703 (8th Cir. 1997) (approving use of residual settlement funds in employee class action for scholarship open to African-Americans to be administered by defendant's charitable foundation). Thus, when, as here, it is impracticable to distribute class action settlement funds to individual class members, either because transaction costs would be prohibitive, or because the sums involved would become nominal on an individualized basis, courts may direct the distribution to persons or institutions that would advance the collective interests of the class.[22] Where, as here, the Special Master has recommended *cy pres* distribution to a sub-set of the class itself, his action is clearly well within existing precedent.

38. The related contention that the Special Master's proposed allocation formula fails to provide an equal benefit to the entire class is similarly flawed. Under equitable principles governing *cy pres* distributions, the entire Looted Assets class is deemed to benefit from the distribution of funds to class members who need help most. In assessing the validity of a *cy pres* distribution, no basis exists to treat residents of the United States as a discrete sub-class of the Looted Assets class, entitled to separate treatment and a legally-defined percentage of the class's *cy pres* distributions. In fact, when a destitute resident of the former Soviet Union is benefited by a *cy pres* distribution, Looted Assets class members residing throughout the world receive a benefit. When a needy resident of the United States is

[22] *In re Matzo Food Products Litigation*, 156 F.R.D. 600 (D. N.J. 1994) is wholly distinguishable. In that case, the Court declined to uphold a proposed *cy pres* distribution in lieu of a distribution to the class because there was no class. The Court found that counsel did not represent any clients, and therefore could not purport to settle a class action without a class.

benefited by a *cy pres* distribution, Looted Assets class members residing throughout the world receive a benefit. When a needy resident of Israel is benefited by a *cy pres* distribution, Looted Assets class members residing throughout the world receive a benefit. Mr. Dubbin's effort to drive legal wedges between and among Holocaust survivors based on where they live is, therefore, simply wrong as a matter of law and policy. The real question is not who lives where, but who needs the funds most intensely. On this record, no basis exists to disturb the Special Master's careful assessment of relative need.

39. Mr. Dubbin's final objection is procedural. It was, he argues, improper to require class members to decide whether to opt-out prior to the public announcement of the plan of allocation and distribution. Since the opt-out deadline preceded the announcement of the allocation formula, Mr. Dubbin argues that the Special Master may not utilize an allocation formula that favors survivors residing in the former Soviet Union at the expense of survivors residing in the United States who would, Mr. Dubbin asserts, have opted-out in droves if they had known of the allocation formula. Once again, Mr. Dubbin is precluded because he is seeking to resurrect an issue that he raised in connection with his appeal from Chief Judge Korman's order upholding the settlement as fair, only to abandon it when the appeal was withdrawn with prejudice. Once again, the issue is without merit.

40. Mr. Dubbin's fanciful story of thwarted opt-out suffers from the same flaw as his effort to vest Looted Assets class members with individualized legal claims to a *per capita* share of assets allocated to the Looted Assets class. Both assume that members of the Looted Assets class possessed valuable individual, as opposed to collective,

claims against Swiss entities for aiding Nazis in disposing of their looted property. Even if, however, the formidable legal hurdles to individualized Looted Assets relief could have been overcome, the factual barriers to individualized recovery were overwhelming. In order to present a successful individual claim, a Looted Assets plaintiff would have been required to link the disposition of particular looted property to a particular Swiss financial institution - a virtually impossible task. Thus, it is highly unlikely that any person would have opted-out to pursue an expensive and quixotic Looted Assets claim against a Swiss bank based solely on Swiss bank's "aiding and abetting" responsibility for Nazi looting.

41. In fact, the only plausible motive for threatening to opt-out would have been to bring undue pressure on the Special Master to abandon his effort to forge a principled plan of allocation and distribution, and to compel him alter his recommendations in an unprincipled manner in order to prevent the settlement from foundering in a welter of conflicting demands from survivors residing in different countries. Indeed, if Mr. Dubbin's opt-out scenario is plausible, one would have expected every other group of survivors to have acted in a similar fashion, thus destroying the settlement. It was precisely to forestall such a socially destructive resort to pressure tactics that would have pitted Holocaust survivors against one another at the end of their lives in an adversary effort to secure a larger share of a fixed fund, that class members were asked, at the very beginning of the administration of the settlement, to commit to a fair procedure for reaching a plan of allocation, instead of delaying approval of the

settlement's fairness until the outcome of the Special Master's effort to forge a plan of allocation and distribution.

42. In my two principal declarations in support of the fairness of the settlement,[23] I explained why it was necessary to establish an opt-out date prior to the development of a precise plan of allocation and distribution. I noted that it would be impossible to undertake the complex and expensive formalities associated with class certification and worldwide notice in the absence of a bifurcated process that dealt, first, with the basic fairness of the settlement; and, second, with the development of a plan of allocation and distribution. I also noted that it would be both administratively impracticable and socially destructive to pit categories of Holocaust survivors against one another in a series of adversary proceedings. Instead, I urged resort to classic principles of political theory by establishing a fair process presided over by a neutral Special Master and the Court, pursuant to which settlement counsel loyal to the entire class would aid all class members in presenting their positions effectively to the Court. Such a process, characterized by "exit, loyalty and voice," was designed to reach a fair plan of allocation and distribution without embroiling the survivor community in a socially destructive and prohibitively expensive series of adversary proceedings.

43. In short, I asked the class to commit to a fair process, and not await a particular outcome. Such an approach met with overwhelming approval from the plaintiff-class, despite the absence of

[23]See Declarations of Burt Neuborne is Support of the Settlements Fairness, dated November 22, 1999, and June 26, 2000, respectively.

assurances about what each survivor would recover. Moreover, such a bifurcated approach had been explicitly sanctioned by the Second Circuit. *In re Agent Orange Litigation*, 818 F.2d 145, 158, 170 (2nd Cir. 1987). See also *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 223-24 (5th Cir. 1981, cert. denied, 456 U.S. 998 (1982). Mr. Dubbin was wrong to challenge such a process in his ill-fated appeal. He is equally wrong in seeking to recycle his objection today.

44. In summary, I urge that Mr. Dubbin's objection be rejected for the following reasons:

A. On this record, the sole objector, an organization denominated HSF-USA, lacks standing to object to the *cy pres* administration of the Looted Assets class. *In re Holocaust Victim Assets Litigation*, 225 F.3d 191, 196 (2nd Cir. 2000).

B. The validity of the Special Master's proposed allocation formula governing distribution of Looted Assets *cy pres* funds has been conclusively upheld by the Second Circuit. *In re Holocaust Victim Assets Litigation*, LEXSEE 2000 U.S. Dist. LEXIS 20817 (November 22, 2000), aff'd., *In re Victim Assets Litigation (Abraham Friedman)* LEXSEE 14 Fed. Appx. 132 (July 26, 2001). See also *In re Victim Assets Litigation*, CV 96-4849 (ERK) (order entered September 25, 2002, approving allocation formula for first supplemental distribution to Looted Assets class – no appeal). Accordingly, Mr.

Dubbin's challenge is barred by principles of preclusion and law of the case;

C. Mr. Dubbin withdrew an earlier appeal (Docket Nos. 00-9217 and 00-9595 (2d Cir.) raising the identical legal issues that underlie his current objection. Accordingly, his current objections are precluded. *Allen v. McCurry* , 449 U.S. 90 (1980); *Federated Department Store v. Moitie*, 452 U.S. 394 (1981);

D. Mr. Dubbin's challenge to the Special Master's decision to recommend an immediate distribution of $60 million, and to defer consideration of a larger distribution from unclaimed funds pending a report from the CRT expected on or about March 15, 2004, concerning the results of ongoing investigations, is clearly unripe and should be dismissed as premature;

E. Mr. Dubbin's allegations that Lead Settlement counsel has broken a promise to survivors residing in the United States is a blatant misstatement of the facts and circumstances surrounding the withdrawal of Mr. Dubbin's appeal that are within the personal knowledge of the Court;

F. Mr. Dubbin's allegation that the Special Master has acted arbitrarily and without factual basis in proposing the current allocation formula is clearly false, and is belied by the existing demographic, economic and social data measuring relative need for the funds;

G. Mr. Dubbin's claim that the Special Master has failed to abide by principles governing *cy pres* distributions in class actions is contradicted both by the careful factual support underlying the Special Master's proposed allocation formula, and by the unanimous weight of legal authority. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179, 185 (2d Cir. 1987); *West Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (SDNY 1970), aff'd 440 F.2d 1079 (2d Cir. 1970) (approving expenditure of settlement funds in antitrust action against pharmaceutical company for general public health projects). See also, eg., *In re Toys "R" Us Antitrust Litigation*, 191 F.R.D. 347 (EDNY 2000) (Gershon, J.) (approving *cy pres* distribution of toys to charities as appropriate component of class action antitrust settlement against toy company); *Jones v. National Distillers*, 56 .Supp.2d 355 (SDNY 1999) (approving *cy pres* distribution of unclaimed class action settlement funds to Legal Aid Society); *Nelson v. Greater Gadsden Housing Authority*, 802 F.2d 405 (11th Cir. 1986) (approving use of unclaimed damages in tenant class action for building repairs); *Powell v. Georgia Pacific Corporation*, 843 F. Supp. 491 (W.D. Ark 1994), aff'd 119 F.3d 703 (8th Cir. 1997) (approving use of residual settlement funds in employee class action for scholarship open to African-Americans to be administered by defendant's charitable foundation). Mr.

JA-7136

Dubbin's claim that the opt-out date must occur subsequent to the development of the plan of allocation and distribution is contrary to existing law, which authorizes bifurcated proceedings in settings where it is necessary to establish the fairness of a class action settlement prior to the development of particularized individual recoveries. *In re Agent Orange Litigation*, 818 F.2d 145, 158, 170 (2nd Cir. 1987). See also *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 223-24 (5th Cir. 1981, cert. denied, 456 U.S. 998 (1982).

45. Accordingly, I respectfully urge that Mr. Dubbin's objections to the immediate release of $60 million to the Looted Assets class for *cy pres* distribution pursuant to the existing allocation formula be denied in all respects.

Dated: November 14, 2003
New York, New York

Burt Neuborne
Lead Settlement Counsel
40 Washington Square South
New York, New York 10012
(212) 998-6172

EXHIBIT 5

JA-7869

Neuborne Feb. 20, 70

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

In re: HOLOCAUST VICTIMS ASSETS LITIGATION
LITIGATION

Master Docket No. CV-96-4849
(ERK) (MDG)

This Document Applies to all Cases

Burt Neuborne, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms:

1. I have served, at the Court's request, as Lead Settlement Counsel in this case since February 1, 1999. Prior to my appointment as Lead Settlement Counsel, I served without fee as co-counsel for all plaintiffs, and as a member of the plaintiffs' Executive Committee. I make this affirmation in brief response to certain statements contained in a recent filing on behalf of an organization denominated as Holocaust Survivors Foundation, USA, Inc. (HSF), dated January 30, 2004, seeking to lodge a legal challenge to the Court's prior rulings concerning the *cy pres* allocation of funds to the Looted Assets class. The HSF filing does not purport to be on behalf of any named individual member of the plaintiff-class, although prior documentation submitted by counsel alleges that at least one constituent organization in Florida has three members who are alleged to possess individual standing to object to the Court's Looted Assets allocation orders.

2. Counsel for HSF, Samuel Dubbin, Esq., alleges that HSF is an umbrella organization consisting of over 50 Holocaust survivor organizations throughout the United States that have as members thousands of persons who belong to the Looted Assets class, and who, Mr. Dubbin alleges, would possess standing in their individual capacities to challenge the Court's allocation

orders. Mr. Dubbin asserts the right of HSF to prosecute legal challenges to the Court's rulings on behalf of such persons without their explicit authorization, even though United Jewish Communities and the New York City Federation of Jewish Philanthropies, the organizations that actually provide services to impoverished Holocaust survivors residing in the United States, have each filed careful submissions on their behalf.

3. On a technical level, I have informed the Court in my letter dated December 16, 2003, that I believe that minimal Article III standing requirements are probably satisfied when a *bona fide* organization asserts the rights of actual members who would otherwise lack the capacity to assert their rights directly. *Friends of the Earth v. Laidlaw Envt'l Services, Inc.*, 528 U.S. 167, 181 (2000); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Thus, assuming the truth of Mr. Dubbin's assertions, I believe that the Court would possess Article III power to entertain the legal challenge posed by the HSF filing.

4. I question, however, whether, in the circumstances of this case, Rule 23 or the prudential aspects of Article III standing authorize such a self-described umbrella organization to purport to act on behalf of unnamed individuals who are allegedly members of one or more of 50 constituent organizations, without producing any evidence that the individuals are aware of the action, and have authorized its prosecution. Allowing counsel for such a self-appointed umbrella group with no members of its own to purport to assert the legal rights of alleged members of constituent organizations without producing proof that individuals with standing actually exist who wish the action to proceed virtually invites entrepreneurial lawyers to claim to represent individuals who may not exist, who have never heard of the lawyer, and who, in fact, disagree with the position asserted.

JA-7871

5. Moreover, whatever the general rule concerning the role under Rule 23(e) of organizations purporting to represent categories of class members without their explicit assent, the particular circumstances of this case argue strongly against recognizing the status of HSF as a self-appointed legal proxy for unnamed members of its constituent groups. Where, as here, the interests of the alleged beneficiaries of the HSF challenge are already adequately protected by careful submissions to the Court by established organizations such as United Jewish Communities and New York City Federation, organizations that actually provide services to the individuals in question, I question whether it is appropriate to accept a legal challenge from such a self-designated group in the absence of explicit authorizations from the alleged individuals whom HSF claims to represent, especially when HSF is represented by an attorney who has already sought to exploit the settlement by unsuccessfully seeking unreasonably large legal fees for providing alleged services to the plaintiff-class on behalf of another client, and whose pursuit of a meritless and ultimately abandoned appeal on behalf of that client actually delayed the distribution of funds to the Looted Assets class for at least six months.

5. While I believe that the Court should rule as a prudential matter that an umbrella organization like HSF lacks the authority under Rule 23 to file a legal challenge to the Court's prior rulings in the absence of explicit authorizations from the unnamed persons it purports to represent, I believe that the Court should, nevertheless, accept the HSF submission as a response to the Court's request to the community for information and suggestions concerning the disposition of residual funds, if any. I do not believe that Article III standing or Rule 23 authorization should limit the community of persons, acting in the nature of *amici curiae*, who wish to address the Court on the issue of the residual distribution. Accordingly, as I suggested in

my December 16, 2003 letter to the Court, Mr. Dubbin's submission on behalf of the alleged members of HSF's claimed constituent organizations should be carefully considered by the Court, whether or not formal standing exists. Such consideration by the Court would not constitute a waiver of the technical question of standing, authority under Rule 23, and power to appeal from an adverse ruling.

6. In that spirit, I will respond briefly to Mr. Dubbin's principal objections to the Court's efforts to distribute funds allocated to the Looted Assets class on a *cy pres* basis on behalf of those members of the Looted Assets class whose extreme poverty and lack of alternative sources of support appeared to both the Special Master and the Court to pose the most intense need for the funds. Mr. Dubbin argues that it is unlawful for the Court to attempt to direct the *cy pres* Looted Assets funds to the survivors with the greatest economic need. Instead, he argues that, as a matter of law, Holocaust survivors residing in the United States are entitled to a *pro rata* allocation of Looted Assets fund on the basis of population, even if the intensity of need appears greater among survivors residing in Israel and the former Soviet Union (FSU).

7. One rhetorical aspect of Mr. Dubbin's position must be clarified at the outset. Mr Dubbin and his supporters often purport to advocate on behalf of all survivors wherever they may reside, stridently demanding that the needs of all be dealt with by the settlement fund. While such a rhetorical posture may shield HSF from a claim that it is acting antagonistically to the interests of survivors residing outside the United States, the rhetoric simply ignores the fact that the finite resources available to the Court as a result of the settlement are not nearly sufficient to meet the worldwide needs of poor Holocaust survivors who constitute the beneficiaries of the *cy pres* administration of the Looted Assets class. A worldwide crisis exists in meeting the needs of

elderly persons. That crisis is even more intense in meeting the needs of elderly Holocaust survivors residing throughout the world. Given the finite nature of the funds available to the Court, and the almost infinite nature of the poor survivors' needs, some form of triage becomes inevitable. In fact, despite HSF's rhetorical smoke-screen, every dollar that the Court directs to poor survivors in one part of the world reduces the amount of settlement funds that are available to poor survivors in another part of the world. Thus, Mr. Dubbin's assertion that 25% of survivors residing in the United States are living at or near the poverty level, even if it were true, merely re-states the obvious fact that the needs of poor survivors far outstrip the resources available to the Court. Mr Dubbin simply refuses to acknowledge that if the Court were to adopt his position and to allocate funds on a *pro rata* basis based on population figures, the percentage allocated to survivors in the United States would increase from 4% to 20%, but that increase would then have to be paid for in corresponding decreases in settlement funds available for the relief of destitute survivors in the FSU, Israel, and elsewhere in the world.

8. Because Mr. Dubbin never acknowledges the necessary impact of his position on destitute survivors in the FSU and Israel, he never comes to grips with the central allocational dilemma facing the Court. Instead, ignoring the impact of his argument on survivors residing in the FSU and Israel, Mr. Dubbin argues that the only lawful allocation of *cy pres* Looted Assets funds is on a country-by-country *pro rata* population basis. His argument rests on two false assumptions.

9. First, Mr. Dubbin argues that the criteria of relative need adopted by the Special Master and the Court is too subjective to constitute a viable legal standard. Although Mr. Dubbin agrees that residual funds should be allocated for the benefit of poor survivors, he insists upon a county-

by-country allocation based on the number of survivors - rich or poor - residing in the country, an allocation criterion wholly divorced from need. Until now, the Special Master and the Court have utilized an allocation standard that identifies destitute survivors with no other visible means of support, whose economic plight requires assistance with the basic needs of life, such as food, fuel or rudimentary medicine. Such a standard is neither vague nor subjective. The Court's baseline has been the 135,000 identifiable destitute elderly Holocaust survivors registered to receive food packages and fuel in the FSU as part of the Hesed program. To the extent extremely poor survivors residing in Israel, Europe, the United States, and the rest of the world have manifested a comparable level of need, the Court has equally included them in the *cy pres* distributions.

10. The contrast between such a careful effort to target the limited funds to the most needy, and Mr. Dubbin's elastic definition of need is striking. In HSF's most recent submission, Mr. Dubbins equates need at various points with "need for a dignified and healthy life in their declining years;" "home care, emergency services and transportation services;" "unmet needs;" "home and health care and emergency services;" "basic life needs not being satisfactorily addressed;" "living below the federal poverty line;" "near poor;" "low income;" and "living in financial distress."

11. Predictably, when Mr. Dubbin's elastic standards are applied to the American survivor population, he generates a figure of 43,500 "needy" American survivors that he argues are legally entitled to receive assistance from the Looted Assets fund on the same terms as the destitute survivors in the FSU. When, however, one applies the criteria used by the Court - extreme poverty requiring assistance with "basic life needs" - to the American survivor community, the thoughtful proposals submitted by the United Jewish Communities and NYC

Federation identify a total of approximately 6,400 identifiable American survivors with "basic life needs" that are even arguably comparable to the need manifested by the 135,000 registered recipients of food and fuel in the FSU. Not surprisingly, the ratio of 6,400 "basic life needs" survivors identified by the UJC/Federation submissions to the 135,000 "basic life needs" survivors registered in the FSU closely tracks the ratio used until now by the Court to allocate *cy pres* Looted Assets funds between the United States and the FSU.

12. Mr. Dubbin also argues incorrectly that, as a matter of law, *cy pres* distributions must benefit the entire class as a whole in a roughly comparable manner. Anything short of a *pro rata* population based allocation, argues Mr. Dubbin, unfairly deprives certain class members of a meaningful *quid pro quo* for the surrender of their legal claims, and unfairly provides other class members with excessive consideration for their claims. But such an assertion incorrectly assumes that the members of the Looted Assets class possess an ascertainable baseline claim to a *pro rata* share of the Looted Assets settlement fund. In fact, the Court's determination that *cy pres* distribution was required in connection with the Looted Assets fund was based on a finding that, given the massive size of the class and the impossibility of determining whose looted assets were fenced through Swiss banks, no member of the class could be said to have an ascertainable individual legal claim, making it necessary to distribute the looted assets funds on a *cy pres* basis.

13. It is, of course, true that *cy pres* allocation may not be used to discriminate among members of a class by favoring one group and disfavoring another on arbitrary or discriminatory grounds. But, where, as here, a principled *cy pres* standard - extreme poverty requiring assistance with basic needs of life such as food, fuel and rudimentary medicine - is applied equally across the entire class, the fact that some class members qualify for payment and some do not is a

necessary consequence of the decision to utilize a *cy pres* approach to distribution. As a legal matter, the application of a principled *cy pres* standard to the entire class benefits the entire class by providing each member with an equal opportunity to satisfy the criteria for payment. As long as the *cy pres* standard is fair and rationally related to the interests of the entire class, and as long as the standard is fairly applied to the known facts, no basis exists for challenging its legal propriety on the ground that the differing economic circumstances of class members residing in different areas inevitably yield distributional results that reflect the differing economic circumstances of the class members.

14. Finally, I claim a personal privilege to defend myself against the ad hominem attacks leveled by Mr. Dubbin. Mr. Dubbin alleges that I am acting unethically in serving as Lead Settlement Counsel in a case where the interests of various groups of survivors may conflict with one another. In particular, he argues that by supporting the looted assets *cy pres* allocations adopted by the Court upon the recommendation of the Special Master, I have betrayed a duty owed to survivors residing in the United States. In addition, he charges me with unprincipled and inconsistent behavior in connection with efforts to allocate a greater percentage of the settlement funds to poor survivors residing in the United States. Neither charge is justified.

15. I have served the plaintiff classes for seven years - two years as co-counsel for all plaintiffs, and five years as Court-appointed Lead Settlement Counsel. During that period, I have undoubtedly made mistakes, but I have never broken a promise or knowingly failed in my responsibilities to the plaintiff classes. The complex, indeed, unprecedented nature of this class action settlement has raised numerous novel issues, not the least of which is the role of Lead Settlement Counsel in a class action settlement involving the need to allocate a fixed settlement

sum among many, potentially conflicting recipients, all of whom have powerful legal and moral claims on the settlement fund. The usual approach of appointing separate, adversary counsel for all possible conflicting groups would have been hugely expensive, administratively unworkable, and, most importantly, socially destructive. As Mr. Dubbin's unfortunate effort in this proceeding to pit survivors in the United States against survivors residing elsewhere in a struggle over "fair" geographically defined shares of a limited settlement fund illustrates, were this settlement to have been administered in a classic adversary lawyer's mode, the survivor community would have risked being torn apart by self-appointed, financially-interested entrepreneurial lawyers for one or more category of victims seeking to maximize their clients' share of the fund, and the size of their legal fees.

16. Instead, the parties and the Court sought to construct a process that would be scrupulously fair to all survivors, but that would not spiral down into an adversary war of all against all. At the Court's request, I agreed to serve as Lead Settlement Counsel because my decision to serve the class without fee during the merits phase had removed the usual concern over a potential financial conflict between counsel's desire for a fee and one or more category of class members. Since I had no economic stake in the settlement, and no reason to favor one or more category of victim over another, the Court believed that I could serve as counsel to the entire class, despite the obvious differences in the membership of various classes and groups within classes. Moreover, since the settlement agreement vests decision-making power over allocation and distribution in a Special Master and the supervising District Judge, I was in a position to serve all plaintiffs equally by assuring that their concerns were brought to the attention of the Special Master and the Court. I have consistently performed that function.

Indeed, I have consulted widely with various groups preparing submissions to the Court in connection with potential residual distributions to assure that the submissions were in proper form and provided the Special Master and the Court with the needed information. Often, I worked with counsel for the submitting groups. Often, I provided assistance in the absence of separate counsel.

17. The novel mechanism for administering the class was carefully explained during the notice phase. Class members were asked to accept a fair process for allocating the settlement funds without knowing what the result of the process might be. In effect, they were asked to approve a process, not an outcome. Operating under a "veil of ignorance"as to the ultimate allocation and distribution of the settlement fund, the class overwhelmingly opted for the fair process. My declarations supporting the fairness of the settlement brought the issue to the Court's attention, and urged that separate adversary counsel for each category of victim was unnecessary and unwise. The Court, in its decision upholding the settlement as fair, explicitly endorsed the complex role of Lead Settlement Counsel.

18. Once the Special Master and the Court act in accordance with the fair procedures to which the class agreed and within the bounds of discretion set by law, I conceive of my role as Lead Settlement Counsel as defending the result of the fair process from attack by self-interested persons seeking a larger share of the settlement fund.

19. In the specific context of Mr. Dubbin's charge that I have broken a promise to American survivors to advocate on their behalf for a larger relative share of Looted Assets funds, the fact is that I have consistently sought to assure that accurate information about the needs of the American survivor community, as well as the needs of survivors residing elsewhere, was

made available to the Special Master and the Court. I have repeatedly encouraged Mr. Dubbin and others to provide the Court with additional data relevant to American survivors if it existed, and to file serious plans with the Court on behalf of American survivors. Although Mr. Dubbin's submission cites to several purported plans that he has submitted in the past, the fact is that no serious plan has ever been submitted on behalf of the American survivor community by HSF, in contrast to the recent thoughtful plans submitted by UJC and the NYC Federation. At the appropriate time, I will provide the Special Master and the Court with my response to the UJC/Federation submission.

20. Finally, I wish to clarify the circumstances of certain letters written be me cited by Mr. Dubbin to support a charge that I have acted improperly. He claims to find a conflict between my letters to Mr. Rechter and others explaining that settlement funds could not be diverted from the Deposited Assets class to poor survivors because the settlement fund is not a charity, and my current assertion that the Court enjoys substantial discretion under the *cy pres* doctrine to allocate funds to the poorest and neediest members of the Looted Assets class. But the two contexts discussed in the letters are wholly dissimilar. The first letters accurately describe the legal impossibility of altering the allocations among the five settlement classes because they are fixed by law. The second position describes the Court's power in allocating funds within a single class for which *cy pres* administration has been deemed necessary. No fair minded lawyer would cite the positions as inconsistent with one another.

21. Similarly, Mr. Dubbin argues that I have breached a promise in a letter to him written in connection with the withdrawal of his client's meritless appeal from the Court's August, 2000 order upholding the fairness of the settlement. The facts are as follows. Mr. Dubbin's client filed

an appeal from the Court's fairness opinion in September, 2000. The appeal was initially dismissed for failure to abide by the scheduling rules of the Second Circuit. At Mr. Dubbin's request, the appeal was then reinstated. It was impossible to move forward with an allocation and distribution program while the appeal was pending because the settlement did not become final until all appeals were resolved. By May, 2001, fully eight months after filing his appeal, no brief or appendix had been filed. After I insisted that no further delay should be permitted, Mr. Dubbin was directed by the Second Circuit to file his brief and appendix on or about May 15, 2001. Approximately one week before his brief and appendix were due, Mr. Dubbin requested a meeting with the Court at which his client agreed to withdraw his appeal. At Mr. Dubbin's request, I wrote a letter to him expressing support for fair treatment for American survivors, and promised to support a thoughtful plan for home health care, if one were submitted. In Chief Judge Korman's presence, I carefully explained to Mr. Dubbin that I had no power to bind the Court, and that my support was conditioned on the production of thoughtful plans and adequate supporting data. Chief Judge Korman carefully reminded Mr. Dubbin's client in my presence that he was withdrawing his appeal without any *quid pro quo* whatever. Mr. Dubbin then withdrew his appeal unconditionally and with prejudice without ever filing a brief or lodging an appendix.

22. Any person familiar with class action litigation will understand that Mr. Dubbin's tactic in filing the appeal was an effort to play "hold-up," by placing a legal obstacle in the path of the settlement's administration that could be removed by acceding to his client's financial demands. In fact, his client attempted to extract funds from the settlement class to fund a Holocaust-related research institution that he would head. When the Court refused even to appear

to bargain over the withdrawal of the appeal, and I adamantly refused to engage in negotiations, Mr. Dubbin unconditionally withdrew his appeal without ever making a serious effort to prosecute it. He and his client subsequently unsuccessfully sought $6 million in fees from the settlement fund for alleged services to the class, including the prosecution of the phantom appeal.[1] In the years since the withdrawal of the appeal, Mr. Dubbin has continually misrepresented the circumstances surrounding the appeal's withdrawal and the legal and moral aspects of my letter to him.

Dated: New York, New York
February 18 , 2004

Burt Neuborne

[1]Mr. Dubbin subsequently withdrew his request for $3 million in attorneys' fees, but continues to seek a substantial fee in excess of $500,000. Mr. Dubbin's client has not withdrawn his request for $3 million in fees for alleged research services to the class. I have recommended rejection of the client's application in full, and an award of not more than $65,000 to Mr. Dubbin. The fee issues remain pending before the Court.